

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN ALLEN BROWN,

Petitioner,

v.

RONALD DAVIS, Warden of California State
Prison at San Quentin,

Respondent.

Case No. 1:19-cv-01796-DAD

DEATH PENALTY CASE

ORDER GRANTING FURTHER
EQUITABLE TOLLING TO AND
INCLUDING AUGUST 1, 2022

(Doc. No. 32)

On December 9, 2021, petitioner Steven Allen Brown, through appointed counsel Sara Cohbra and John Mills, moved to equitably toll the limitations deadline under 28 U.S.C. § 2244 for the filing of his federal habeas petition in this action. The motion, petitioner's third, requests that the current, as tolled, petition filing deadline of February 1, 2022 be further equitably tolled to and including August 1, 2022.

Respondent Warden Ronald Davis, through counsel Deputy Attorney General Charity Whitney, timely filed his response to the motion on January 12, 2022. Petitioner timely filed a reply in support of the motion on January 18, 2022. Petitioner then filed supplemental authority in support of the motion on January 24, 2022. No hearing date has been set and the

////

1 court finds that none is required. The matter is deemed submitted for a decision.¹

2 Having considered the pleadings, supplemental authority, and the record, the court will
3 grant petitioner's motion for further equitable tolling of the applicable statute of limitations to
4 and including August 1, 2022, for the reasons explained below.

5 I. BACKGROUND

6 The procedural posture of this case, detailed in the court's initial tolling order (Doc. No.
7 26), is summarized here.

8 On January 5, 1996, petitioner was convicted of first degree murder, sodomy, and
9 forcible lewd acts on a minor under 14, with the special circumstance of murder in the
10 commission of the sexual offenses, and sentenced to death. *People v. Steven Allen Brown*,
11 Tulare County Superior Court Case No. 32842. The crime occurred in 1988. *Id.*

12 On June 2, 2014, the California Supreme Court affirmed petitioner's judgment of
13 conviction and sentence on automatic appeal. *People v. Brown*, 59 Cal. 4th 86 (2014). The
14 United States Supreme Court denied certiorari on February 23, 2015. *Steven Allen Brown v.*
15 *California*, 574 U.S. 1160 (2015).

16 On September 11, 2019, the California Supreme Court summarily denied petitioner's
17 state habeas petition on the merits. *Brown on H.C.*, Case No. S200366.

18 On December 23, 2019, petitioner, *pro se*, commenced this federal habeas proceeding
19 pursuant to 28 U.S.C. § 2254. (Doc. Nos. 1-2.)

20 On January 31, 2020, the court appointed Sara Cohbra, Esq. and John Mills, Esq. to
21 represent petitioner in this proceeding. (Doc. No. 8.)

22 On July 30, 2020, respondent lodged the record. (Doc. Nos. 19-25.)

23 On August 27, 2020, the court granted petitioner's first motion to equitably toll the
24 limitations deadline of 28 U.S.C. § 2244 from September 11, 2020 to and including June 1,
25 2021, observing: (i) the delay in appointment of federal habeas counsel, (ii) the extraordinary

26 ¹ See Doc. No. 33; see also Standing Order in Light of Ongoing Judicial Emergency in the
27 Eastern District of California (Doc. No. 12), and General Orders in the Eastern District of
28 California regarding COVID-19 Emergency available at:
<http://www.caed.circ9.dcn/index.cfm/iCAED/coronavirus-covid-19-guidance/>

conditions brought about by COVID-19 pandemic at that time preventing petitioner's timely filing of a complete federal habeas petition in this action notwithstanding the ongoing exercise of reasonable diligence on the part of petitioner and his counsel, and (iii) respondent's failure to show prejudice should relief be granted.

On May 7, 2021, the court granted petitioner's second motion to equitably toll the limitations deadline of 28 U.S.C. § 2244 from June 1, 2021 to and including February 1, 2022, observing: (i) the exceptional and extraordinary circumstances of the COVID-19 pandemic continue to impede petitioner's right to the assistance of appointed habeas counsel in preparing a complete federal habeas petition, notwithstanding counsel's ongoing reasonable diligence, (ii) the investigation and claim development required of the defense team in this case is extensive, and (iii) respondent's failure to show prejudice should relief be granted.

II. DISCUSSION

Petitioner now argues that notwithstanding continuing diligent efforts by his counsel and defense team, lingering COVID-19 impacts identified in the prior tolling motions exacerbated by new highly transmissible variants infecting even the fully vaccinated, and COVID-19 infection among San Quentin State Prison inmates and staff and among the defense team and members of their households, present extraordinary circumstances impeding the investigation, development and presentation of a complete federal habeas petition prior to the requested as tolled date of August 1, 2022. (Doc. No. 32 at 3-4, 7-16.)² He argues the ebb and flow of the ongoing COVID19 pandemic has and will impede the necessary investigation, including: (i) collection of the core and non-core record and background materials, especially materials in paper form, (ii) discovery from the state including pending requests for missing records not otherwise available in prior counsel's files, (iii) in-person one-on-one, contact interviews with petitioner and witnesses, and (iv) expert mental health and forensic evidence testing and evaluation relating to yet to be assembled crime scene evidence and witness statements, and related consultations. (*Id.*)

² Throughout this order, reference is to CM/ECF system pagination.

1 Petitioner argues the continuing impact of these impediments is particularly
2 pronounced in this case due to: (i) uncertainty whether petitioner has contracted COVID-19,
3 the immunocompromised status of potential witnesses known to be elderly or ill, and the high
4 risk of COVID-19 transmissibility in areas of field investigation; (ii) the recurring and current
5 limitations on in person and contact legal and expert visitation at San Quentin and resultant
6 backlog, (iii) COVID-19 exposure, infection and illness within the defense team
7 notwithstanding vaccination, and (iv) case complexity and the sparse investigation and
8 development for forensic and mitigating evidence by trial and state post-conviction counsel.
9 (*Id.*; Doc. Nos. 35-1, 36; *see also* Doc. Nos. 27, 30, 31.)

10 Petitioner represents that his counsel and the defense team will continue their diligent
11 efforts: (i) communicating with prior counsel, (ii) reviewing and digesting the trial record and
12 trial counsel's files, (iii) gathering records and seeking discovery, remotely and in-person, (iv)
13 conducting online case related research, (v) conducting confidential in-person client visits, (vi)
14 identifying and locating potential witnesses, reviewing witness materials, and preparing for and
15 conducting confidential in-person witness interviews, (vii) meeting with and providing
16 materials to experts and conducting related consultations, and (viii) discussing claim
17 development amongst the defense team via Zoom. (Doc. No. 32 at 10-16; Doc. No. 35 at 4-10,
18 and documents cited therein.)

19 Respondent argues the court should deny the instant motion without prejudice to
20 renewal because petitioner posits only a "theoretical possibility of COVID-19 transmission."
21 Respondent contends that petitioner has not proffered evidentiary facts that notwithstanding
22 current COVID-19 safety practices and protocols, and diligent efforts, a petition containing
23 record claims cannot be presented prior to the current February 1, 2022 as tolled deadline.
24 (Doc. No. 34 at 6-11 16.) Particularly, respondent argues that petitioner's claims of COVID-
25 19 related impediments at San Quentin, and illness amongst the defense team are unsupported
26 by affidavits, documents, or other evidentiary facts. (*Id.* citing *Frye v. Hickman*, 273 F.3d
27 1144, 1146 (9th Cir. 2001), Fed. R. Civ. P. 6(c)(2), 11, 43(c), and 78(b); E. D. Cal. Local
28 Rules, Rule 230(h); *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, 255 F. Supp. 3d

1 1012, 1027 (S.D. Cal. 2017).)

2 Respondent argues petitioner has unreasonably chosen not to file his petition absent
3 ideal conditions and compliance with non-binding American Bar Association Guidelines for
4 the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)
5 (hereinafter “ABA Guidelines”) and ABA Supplementary Guidelines for the Mitigation
6 Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677 (2008),
7 (hereinafter “Supplementary Guidelines”. (Doc. No. 34 at 9-16.) He suggests any COVID-19
8 related impediments, even if exacerbated by the alleged deficiencies of petitioner’s state habeas
9 counsel, have not prevented petitioner’s timely filing of a petition containing the claims
10 exhausted in state court. (*Id.* citing 28 U.S.C. § 2254(b); *Baldwin v. Reese*, 541 U.S. 27, 29
11 (2004); *Ryan v. Gonzales*, 568 U.S. 57, 68 (2013).) Relatedly, respondent suggests for the first
12 time that petitioner cannot show diligence by speculating on the need to develop potential new
13 evidence and unexhausted habeas claims because this court cannot grant relief thereon. (*Id.*)

14 Respondent also argues that petitioner fails to account for the progress made against
15 COVID-19 since the court last granted equitable tolling. (Doc. No. 34 at 9-16.) He observes
16 that COVID-19 vaccines have been broadly administered with 71.4% of California residents
17 and 91% of San Quentin inmates having received vaccinations. (Doc. No. 34 at 9; Doc. No.
18 34-7.) He suggests that COVID-19 mitigation safety practices and testing are widely available
19 and treatments for the disease are constantly improving. (Doc. No. 34 at 6, 9; Doc. No. 34-7.)
20 He suggests that San Quentin has been mostly open for legal visits during 2021, and that
21 confidential legal phone calls have been available during that time. (Doc. No. 34 at 10, 13; *see*
22 *also* Doc. Nos. 34-1 – 34-5.)

23 Petitioner replies with evidentiary facts that even counsel’s diligent efforts cannot
24 overcome the impediments raised by the Delta and Omicron surges of 2021-22, and the press
25 of other matters also delayed by COVID-19, that in combination have prevented timely
26 development and presentation of augmented and new claims appropriately raised in his initial
27 federal petition. (*See* Doc. No. 35-1 at 1-8 and materials cited therein.) He argues respondent
28 is wrong in suggesting that evidence and claims not presented in state court have no place in

1 the initial petition, and points to potential new evidence and colorable claims of ineffective
2 assistance of state counsel raising intellectual disability, incompetence for trial, and unasserted
3 trial defenses. (Doc. No. 35 at 10-11, citing ABA Guideline 10.15.1; Doc. No. 35-1 at 1-8;
4 *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *In re*
5 *Friend*, 11 Cal. 5th 720, 731 (2021); *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018).)

6 “A habeas petitioner is entitled to equitable tolling only if he shows (1) that he has been
7 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way
8 and prevented timely filing.” *Fue v. Biter*, 842 F.3d 650, 653 (9th Cir. 2016) (*en banc*)
9 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)); *see also Espinoza-Matthews v.*
10 *California*, 432 F.3d 1021, 1026, n.5 (9th Cir. 2005) (citing *Pace v. DiGuglielmo*, 544 U.S.
11 408, 418 (2005)); *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288-89 (9th
12 Cir. 1997) (approving prospective equitable tolling of the one year statute of limitations under
13 28 U.S.C. § 2244(d) where “extraordinary circumstances” beyond a prisoner’s control make it
14 impossible to file a petition on time), *partially overruled on other grounds by Calderon v.*
15 *United States Dist. Ct. (Kelly V)*, 163 F.3d 530, 540 (9th Cir. 1998), *abrogated on other*
16 *grounds by Woodford v. Garceau*, 538 U.S. 202, 206 (2003).

17 In addition, there must be a causal link between the extraordinary circumstance and the
18 inability to timely file the petition. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013)
19 (“[E]quitable tolling is available only when extraordinary circumstances beyond a prisoner’s
20 control make it impossible to file a petition on time and the extraordinary circumstances were
21 the cause of the prisoner’s untimeliness.”). A literal impossibility to file, however, is not
22 required. *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017) (stating that equitable tolling
23 is appropriate even where “it would have technically been possible for a prisoner to file a
24 petition,” so long as the prisoner “would have likely been unable to do so.”).

25 Equitable tolling is limited to rare and exceptional circumstances and typically applied
26 sparingly. *Cadet v. State of Florida Department of Corrections*, 853 F.3d 1216, 1221 (11th
27 Cir. 2017). It may be appropriate where external forces, rather than a petitioner’s lack of
28 diligence, account for the failure to file a timely claim. *Miles v. Prunty*, 187 F.3d 1104, 1107

(9th Cir. 1999); *see also Holland*, 560 U.S. at 653 (equitable tolling requires reasonable diligence, not maximum feasible diligence); *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011) (the effort required is what a reasonable person might be expected to deliver under his or her particular circumstances). Among the factors that courts have considered relevant in deciding whether equitable tolling of the limitations period is appropriate are the complexity of the legal proceedings and whether the state would suffer prejudice from the delay. *Hoyos v. Wong*, Case No. 09-cv-0388 L (NLS), 2010 WL 596443, at **4, 5 (S.D. Cal. Feb. 16, 2010).

Here, the court finds that at this point in time and on the facts and evidence now before it, extraordinary circumstances arising from the ongoing COVID-19 pandemic and its Delta and Omicron surges, make the investigation, development, and presentation of a complete federal habeas petition extremely unlikely, if not impossible, for another six months, notwithstanding the existing and anticipated exercise of reasonable diligence by petitioner and his counsel.³

Since this matter was last before the court, the relative risk of COVID-19 infection and illness presented by in person contact with petitioner, witnesses and experts, and related travel and personal interaction has trended significantly upward. The court takes notice of: (i) the relative rise in COVID-19 cases and deaths over the last six months nationwide (*see* https://covid.cdc.gov/covid-data-tracker/#trends_dailycases [dailydeaths], <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html>) (last visited Jan. 25, 2022), and within California (*see*

³ The court declines respondent's invitation to revisit its previous determination that petitioner may seek equitable tolling to develop additional claims. (*See* Doc. No. 26 at 8-12, 15; *see also* Rules Governing § 2254 Cases, Rules 2, 28 U.S.C.A. foll. § 2254; *Ayestas*, 138 S. Ct. at 1094 (proper application of the "reasonably necessary" standard of 18 U.S.C. § 3599(f) requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way); *Rhines*, 544 U.S. at 277 (petitioner may file a federal mixed petition for state exhaustion); *cf. Smith v. Davis*, 953 F.3d 582, 601 (when a petitioner acts diligently to prepare a habeas petition, it matters not if he recycles arguments previously made by counsel to state courts).

1 <https://covid19.ca.gov/state-dashboard/#county-statewide>) (last visited Jan. 25, 2022), (ii) the
 2 current high COVID-19 transmission level throughout California (*see*
 3 [https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=California&data-](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=California&data-type=Risk&list_select_county=6107)
 4 [type=Risk&list_select_county=6107](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=California&data-type=Risk&list_select_county=6107)) (last visited Jan. 25, 2022), and (iii) the current COVID-
 5 19 modified program in effect at all California prisons including San Quentin (where petitioner
 6 lives) excluding all visitors during the period January 9, 2022 through February 6, 2022 (*see*
 7 www.cdcr.ca.gov/visitors/) (last visited Jan. 25, 2022). Fed. R. Evid. 201(b); (*see also* Doc.
 8 No. 34 at 9, n.1; Doc. No. 34-6; Doc. No. 36.)⁴

9 Petitioner has shown extraordinary ongoing COVID-19 safety restrictions and
 10 practices, and heightened concern and hesitance over transmissibility and illness, have defied
 11 and disrupted the defense team’s scheduled investigation and development of record and non-
 12 record evidence and colorable claims. For example, the defense team variously has been
 13 delayed and denied with regard to prison visits; assembly and discovery of relevant records;
 14 access to lay witnesses and testimony; and examination, analysis, and opinion work by retained
 15 forensic and mental health experts. (*See* Doc. No. 35-1, 36) Even if the hoped for flattening of
 16 the current COVID-19 surge comes to fruition in the coming weeks, the time reasonably
 17 necessary to marshal and develop investigative facts, and provide them to forensic and mental
 18 health experts for their examination and opinion, already has been lost. (*Id.*)

19 Given the foregoing, the general availability of COVID-19 vaccines, boosters, masks,
 20 social distancing, and other safety practices noted by respondent, alone are unlikely to mitigate
 21 these ongoing exceptional circumstances in a way that would allow timely presentation of a

22 ⁴ The undersigned would also note that on January 3, 2022, in response to the alarming surge
 23 of COVID-19 infections in California, the U.S. District Court for the Central District of
 24 California temporarily suspended all civil and criminal jury trials and later extended that
 25 suspension through and including February 28, 2022. *See*
 26 <https://www.cacd.uscourts.gov/news/extension-temporary-suspension-jury-trials>. Although the
 27 U.S. District Court for the Eastern District of California has deferred making such a court-wide
 28 determination and instead left the determination of whether to suspend in-person hearings to
 each judge of the court, the undersigned has also temporarily suspended all in person hearings
 and trials through and including February 28, 2022 in light of the currently reported 33.3%
 positive test rate for COVID-19 infection in Fresno County. *See* [https://covid19.ca.gov/state-](https://covid19.ca.gov/state-dashboard/#location-fresno)
[dashboard/#location-fresno](https://covid19.ca.gov/state-dashboard/#location-fresno)

1 complete federal petition prior to the requested as tolled date of August 1, 2022. Especially so,
2 given the allegedly insufficient investigation by state post-conviction counsel, and the court's
3 previous observation that this case involves complex issues and a voluminous record,
4 suggesting that an extensive investigation is required of the defense team. (*See* Doc. No. 26 at
5 6, citing Doc. Nos. 19-25; *cf.* Doc. No. 34 at 14-15.) The core record lodged in this case spans
6 16,627 pages including: (i) the 365 page appellate opening brief stating 11 claims including
7 subclaims, (ii) the California Supreme Court's 41 page reasoned opinion affirming the
8 judgment of conviction and sentence on automatic appeal, and (iii) the 159 page state habeas
9 corpus petition asserting 18 claims and subclaims supported by 8 exhibits totaling 159 pages.
10 (*See* Doc. No. 26 at 6, citing Doc. Nos. 19-25.)

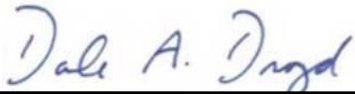
11 Additionally, respondent does not suggest he would suffer any prejudice should the
12 requested relief be granted. The court finds no reason to believe that respondent would suffer
13 any prejudice from the additional six month delay in the filing of the petition sought by
14 petitioner's counsel. Nothing before the court suggests any significant impact upon the ability
15 of respondent to oppose any challenges raised by petitioner to his underlying judgment of
16 conviction.

17 The court, having twice granted COVID-19 related equitable tolling in this case on
18 facts then before it, concludes the exceptional and extraordinary circumstances of the COVID-
19 19 pandemic continue to impede petitioner's right to the assistance of appointed habeas
20 counsel in preparing his federal habeas petition, notwithstanding counsel's reasonable
21 diligence. 18 U.S.C. § 3599(a)(2); *McFarland v. Scott*, 512 U.S. 849, 855-57 (1994) (given the
22 complex nature of capital habeas proceedings and the seriousness of the possible penalty, an
23 attorney's assistance in preparing a federal habeas corpus petition is crucial and includes a
24 right for that counsel meaningfully to research and present a defendant's claims); *McCleskey v.*
25 *Zant*, 499 U.S. 467, 498 (1991) (in the pre-AEDPA context, stating that "[P]etitioner must
26 conduct a reasonable and diligent investigation aimed at including all relevant claims and
27 grounds for relief in the first federal habeas petition."), *superseded by statute as recognized in*
28 *Banister v. Davis*, ___U.S.___, 140 S. Ct. 1698, 1707 (2020).

1 Accordingly, petitioner's third motion for equitable tolling (Doc. No. 32) is granted.
2 Petitioner shall file his federal habeas petition on or before August 1, 2022.

3
4 IT IS SO ORDERED.

5 Dated: **January 28, 2022**


UNITED STATES DISTRICT JUDGE